Federal Court Cour fédérale

Date: 20170427

Docket: T-1072-15

Citation: 2017 FC 414

Ottawa, Ontario, April 27, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DALE KOHLENBERG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Dale Kohlenberg [the Applicant] pursuant to s. 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, of a third-level grievance decision dated December 10, 2014 and June 2, 2015, in which the Applicant's assigned work description was found to be accurate. The Applicant, a Department of Justice lawyer himself, was gowned and argued his own case before the Court.

II. Facts

[2] The Applicant is a lawyer at the Department of Justice Canada [DOJ]. As part of an effort to reclassify all lawyers in its practitioners (LA) group, the DOJ issued new, generic work descriptions to those employees in that group. Accordingly, as a result of the re-classification, the Applicant received a *Legal Advisor – Regions – LA-2A* work description in November 2011. This generic work description could not be changed; however, with management's agreement, it could be replaced with a different generic work description.

[3] The DOJ directed those who disagreed with the work description (or classification) assigned in 2011 to discuss their situation with management. The Applicant, as one such person, requested that he be assigned what he believed to be a more appropriate work description and classification. As a result of this request, he met with two more senior lawyers in management at the DOJ: Daryl Schatz [Mr. Schatz] and Michael Brannen [Mr. Brannen]. Mr. Schatz is the Regional Director of the Business and Regulatory Law Portfolio. Mr. Brannen is the Deputy Regional Director of the Saskatoon Office in the Prairie Region. The Work Description meeting took place in December 2011.

[4] Some six months later, the Applicant received a *Review & Update of Work Description* [Work Description]. This Work Description, dated June 18, 2012, advised the Applicant that his "work description has been reviewed and updated and has been confirmed at the LAAAA02 [sic] occupational group and level, effective October 17, 2011." This confirmed the Applicant's classification at the LA-2A position.

[5] The Work Description document was signed by the "**PRO OD&C Team**, Human Resources, Prairie Region, Department of Justice Canada" in Edmonton, Alberta [Prairie Region]. The Work Description and classification was the same as that provided to the Applicant in November 2011. Although the actual details of the Work Description were provided to the Applicant by way of a separate document, I will refer collectively to both the LA-2A Work Description and the *Review & Update* document as the Work Description. It is the appropriateness of this Work Description that was being grieved by the Applicant.

[6] The Applicant had the right under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [*PSLRA*] to file two different grievances: a Work Description grievance and a Classification grievance. The Applicant filed both; however the Classification grievance has been held in abeyance pending the resolution of the Work Description grievance.

[7] The Applicant filed his Work Description grievance on July 9, 2012. He stated that the job description did not accurately reflect the work he does or is expected to do. He argued that there were three higher-level generic work descriptions that more accurately described his work – two at the LA-2B level and one at the LA-3B level.

[8] The differences between what he received and what the Applicant seeks in his Work Description grievance are material; his sought-after work description provides both higher salary and higher pension entitlements.

[9] The Applicant is excluded from the DOJ lawyers' bargaining agent, the Association of Justice Counsel [AJC], by virtue of having provided labour relations advice to DOJ; he had at one time been in a more senior management position. He was therefore not covered by the collective agreement between the ACJ and DOJ. Significantly, the matters he sought to grieve fell within the purview of the ACJ-DOJ collective agreement at the relevant time.

[10] That said, the Applicant was entitled to the same three-level grievance procedure afforded to ACJ union members. Should he be unsuccessful at the third level however, the Applicant would be required to request and receive approval and representation by the ACJ in order to proceed to adjudication before the Public Service Labour Relations Board [PSLRB]: *PSLRA* s. 209(2).

[11] The Applicant's grievance was dismissed at all three levels. After the third-level decision, as a formality, he applied to the PSLRB to proceed to adjudication, but did so without the approval of the ACJ. Therefore, the PSLRB declined to accept jurisdiction. The Applicant seeks judicial review of the decision dismissing his third-level grievance.

[12] The determinative issue in this case is procedural fairness. The Applicant alleges that he was denied procedural fairness at all three levels of the grievance procedure. I will therefore set out the governing law concerning procedural fairness within the labour grievance context and then apply it to the facts of this case.

[13] Also at issue is the reasonableness of the decision made by the third-level officer, Assistant Deputy Minister of the Management Sector and Chief Financial Officer Marie-Josée Thivierge [ADM], who dismissed the Applicant's third level grievance.

[14] As part of this analysis, I will assess the reasonableness of each of the three decisions. However, it must be noted that the procedural flaws in the second and third level grievance decision-making process (the flaws in the second level decision flow through to the third) render the third level decision unsustainable on judicial review; it must be set aside. Had the third level decision not been flawed by procedural unfairness (including those at the second level which flowed to the third), I would have upheld the third-level grievance decision as reasonable.

III. Standards of Review

[15] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[16] This Court has accepted, and I agree, that the duty of fairness owed by an employer such as the DOJ to a grievor such as the Applicant is at the low end of the spectrum: *Begin v Canada*

(Attorney General), 2009 FC 634 at para 9; *Majdan v Canada (Attorney General)*, 2011 FC 146 at para 305 [*Majdan*]; *Fischer v Canada (Attorney General)*, 2012 FC 720 at para 25; *Tamborriello v Canada (Attorney General),* 2014 FC 607 at paras 21-22; *Chong v Canada (Treasury Board)* (1999), 170 DLR (4th) 641 (FCA)at paras 12-13; and *Gladman v Canada (Attorney General)*, 2016 FC 917 at para 32.

[17] However, as will be seen, being entitled to fairness at the low end of the spectrum does not sanction a decision that, when considered in its factual context, is not essentially fair.

[18] In *Dunsmuir* above at paras 57, 62, the Supreme Court of Canada held that a reasonableness standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." In this connection, a final-level grievance decision under s. 208(1) of the *PSLRA* is reviewed on the standard of reasonableness: *Girard v Canada (Attorney General)*, 2013 FC 489 at para 16; *Tibilla v Canada (Attorney General)*, 2011 FC 163 at paras 17-18; *Boucher v Canada (Attorney General)*, 2016 FC 546 at para 13.

[19] In *Dunsmuir* above at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[20] The Supreme Court of Canada also instructs that judicial review on the reasonableness standard is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

IV. Relevant Provisions

[21] At the time of the Applicant's grievance in June 2012, he was an excluded member pursuant to s. 59(1)(c) of the *PSLRA* and therefore not covered by the collective agreement for unionized DOJ lawyers. It is common ground that his status as an excluded member was confirmed by order of the PSLRB to that effect.

Managerial or Confidential Positions **Application** **59 (1)** After being notified of an application for certification made in accordance with this Part, the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that	**Postes de direction ou de confiance** **Demande** **59 (1)** Après notification d'une demande d'accréditation faite en conformité avec la présente partie, l'employeur peut présenter une demande à la Commission pour qu'elle déclare, par ordonnance, que l'un ou l'autre des postes visés par la demande d'accréditation est un poste de direction ou de confiance pour le motif qu'il correspond à l'un des postes suivants :
…	…
(c) the occupant of the position provides advice on labour relations, staffing or classification;	c) poste dont le titulaire dispense des avis sur les relations de travail, la dotation en personnel ou la classification;
…	…

[22] Despite his excluded status, the Applicant still qualified as an "employee" under the *PSLRA* for the purposes of the grievance process:

Definitions **2 (1)** The following definitions apply in this Act. … ***employee***, except in Part 2, means a person employed in the public service, other than … (i) a person who occupies a managerial or confidential position; or… [emphasis added]	**Définitions** **2 (1)** Les définitions qui suivent s'appliquent à la présente loi. … ***fonctionnaire*** Sauf à la partie 2, personne employée dans la fonction publique, à l'exclusion de toute personne : … i) occupant un poste de direction ou de confiance; … [soulignements ajoutés]

[23] Under s. 208 of the *PSLRA* (found in Part 2 of that Act dealing with grievances), an employee such as the Applicant is entitled to present an individual grievance in situations such as this. This is not in dispute.

[24] However, as an excluded employee not covered by a collective agreement, the Applicant was not able to access adjudication under the *PSLRA* without the approval of the applicable bargaining agent – in this case, the AJC:

Reference to Adjudication **209 (1)** An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to (a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award; (b) a disciplinary action resulting in termination, demotion, suspension or financial penalty; (c) in the case of an employee in the core	**Renvoi d'un grief à l'arbitrage** **209 (1)** Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur : a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale; b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire; c) soit, s'il est un fonctionnaire de

public administration, (i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or	l'administration publique centrale : (i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,
(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or	(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;
(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.	d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).
Application of paragraph (1)(a) (2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings. [emphasis added]	**Application de l'alinéa (1)a)** (2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage. [soulignements ajoutés]

[25] Final level grievance decisions are final and binding where the individual grievance is not one that may be referred to adjudication under s. 209 of the *PSLRA*, as here:

Binding Effect **214** If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken on it.	**Décision définitive et obligatoire** **214** Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause.

[26] A work description grievance follows the standard labour relations grievance process. Excluded employees who are not covered by a collective agreement must follow the grievance

procedures referred to in the *Public Safety Labour Relations Regulations*, SOR/2005-79 [*Regulations*].

[27] Under s. 64 of the *Regulations*, the individual grievance process may consist of a maximum of three levels (also referred to as "steps"). At each level or step, the decision-maker is a representative of management. The following table, provided by the Respondent, summarizes which individual(s) may act as step officer at each stage of the grievance process. I have added in brackets the name and title of the individual concerned in this case:

Level	Step Officer
First	Employee's manager or manager's supervisor [Mr. Schatz, Regional Director, Business and Regulatory Law Portfolio]
Second (and third)	Progressively higher levels of management [Mr. Shenher, Acting Regional Director, Prairie Region]
Final	Deputy Minister (may be delegated) [Ms.Thivierge, Assistant Deputy Minister, Management Sector and Chief Financial Officer]

V. Outline and analysis of the three steps in this grievance process

A. First-level grievance before Mr. Schatz and general approach

[28] The three step grievance process at issue involved each level's step officer being cognizant of the decision(s) below. I will therefore look at each of the three steps and assess each on the grounds of procedural fairness and reasonableness. That said I do this for analytical and contextual purposes only, because only the third-level decision is the subject of this judicial

review. I also do this because the Applicant raises issues with all three decisions, and because procedural unfairness or unreasonableness in grievance levels one or two may flow through to and impact the third level grievance decision.

[29] The first-level grievance was heard by the Applicant's manager, Mr. Schatz. On July 9, 2012, the Applicant in fact submitted his grievance to Mr. Brannen. In November 2012, the Applicant submitted a memorandum to Mr. Schatz, as first-level step officer, which outlined his submissions regarding his Work Description grievance. I should note that the Applicant agreed in cross-examination that the grievance structure is such that the first-level step officer is always the manager of the employee in question.

[30] In his November 2012 memorandum, the Applicant set out his objections to the Work Description provided to him. He also requested that Mr. Schatz voluntarily remove himself as first-level step officer on the grounds of bias. The Applicant alleged that, as Mr. Schatz had confirmed the Work Description that formed the basis of the Applicant's grievance, Mr. Schatz would be unable to act impartially as step officer. This, the Applicant submitted, would result in a reasonable apprehension of bias and deny the Applicant his right to a fair hearing.

<u>The First-Level Grievance</u>

[31] The first-level hearing occurred on November 9, 2012. The Applicant attended the grievance hearing and repeated the recusal request he made in his memorandum to Mr. Schatz; once again, however, Mr. Schatz refused to remove himself from the proceedings. The Applicant left the hearing, and did so he said, so as to avoid giving the appearance of having consented to

Mr. Schatz acting as first-level step officer. On this point, I note parenthetically that the Applicant could have stayed "under protest", although nothing turns on it.

[32] On November 28, 2012, the Applicant's grievance was dismissed [First Level Decision]. Mr. Schatz reviewed the Applicant's submissions in making his decision and concluded that there was no issue of bias for which he was required to remove himself as first-level step officer:

> As the manager delegated and responsible for the assignment of work and responsibilities, I believe I am well placed to review this matter and make a determination, based on representations made, as to whether or not your current work description accurately describes the work and responsibilities that are assigned to you.

[33] In my view, that finding is well justified.

[34] Mr. Schatz noted the Applicant's submissions that the Work Description failed to properly describe his provision of specialized legal services, the complexity of his workload and his leadership role within the advisory group. However, Mr. Schatz concluded:

> Having had the opportunity to review the written material that you have provided as well as the work assigned to you, I am satisfied that your current work description accurately describes your core duties and responsibilities. In particular, I have noted the following description contained under the heading of "Client Service Results" of your work description, which reads:
>
> > "*Provides a broad range of legal services and legal advice in assigned areas of law/client departments or agencies, typically on matters of considerable complexity, breadth, scope, risk and/or impact, often involving multiple client department interests, horizontal issues, the leadership and coordination of teams and resources, and having implications on multiple client department and/or agency policy, process, and business operations, as well as potentially on governing legislation.*"

[35] Despite the Applicant's arguments to the contrary, it is my respectful view that there was neither procedural unfairness nor unreasonableness in the First-Level Decision.

[36] There was no procedural unfairness because, despite being pressed on this at the hearing before this Court, the Applicant was unable to provide any evidence that Mr. Schatz made the decision that classified the Applicant at the LA-2A level, or that he had determined the contents of the generic Work Description being grieved. In fact, the evidence was that work description (and classification) decision was made by the Prairie Region of the DOJ in Edmonton. In addition, the allegation of bias is difficult to square with the Applicant's admission in cross-examination that the grievance structure is such that, the first-level grievance officer is always the manager of the employee in question. In this case, that manager was Mr. Schatz.

[37] For completeness, I reject as without any merit the Applicant's allegation, advanced in his affidavit and repeated in oral argument, that the First-Level Decision was improperly motivated in the sense that Mr. Schatz denied the Applicant a higher work description to hold the line on or maintain actual costs and thereby obtain annual performance pay bonuses for himself. There is not a shred of evidence to support that assertion.

<u>Reasonableness of First-Level Decision</u>

[38] In terms of reasonableness, I am also unable to agree with the Applicant. The decision is intelligible and transparent. It recites the evidence filed by the Applicant. Mr. Schatz reviewed the Applicant's concerns as he had summarized them and answered them directly. He concluded that the Applicant's "current work description accurately describes your core duties and

responsibilities." He pointed to the specific provision in the contested Work Description and, in my respectful opinion, reasonably found a match between what the Applicant did and the contents of the Work Description. Given the deference afforded, I am satisfied that the decision of Mr. Schatz is defensible on the facts and law and, as already noted, not flawed by procedural unfairness.

B. The Second-Level Grievance Decision before Mr. Shenher

[39] The Applicant's grievance was then transmitted to the second-level step officer, the Acting Regional Director for the Prairie Region, Mr. Shenher. In addition to challenging the Work Description on the merits, the Applicant also raised the issue of bias at the first level. No bias allegation was directed against Mr. Shenher.

[40] The Applicant's second-level grievance was dismissed on October 4, 2013 [Second-Level Decision]. Mr. Shenher concluded that the Applicant's "core functions fall within the skills of a LA 2A counsel"; he held that the work the Applicant described himself as doing "is within the generic work description" being grieved. In denying the Applicant's grievance, Mr. Shenher stated that he "support[ed] the decision at the first level".

[41] The Second-Level Decision made no reference to the Applicant's allegations of bias against Mr. Schatz. I am unable to fault Mr. Shenher on this point; as I found above, there was no procedural unfairness in the First Level Decision.

Procedural Fairness of the Second-Level Grievance Decision

[42] In my respectful view, the decision at the second-level was tainted by procedural unfairness. I make this finding for several reasons.

[43] First, in making his decision on the Applicant's allegations, Mr. Shenher had before him a negative memorandum written by Mr. Schatz and Mr. Brannen [Schatz/Brannen Memo]. This memo formed part of the record before Mr. Shenher as the second level grievance officer. This memorandum, material and relevant to the decision, was not disclosed to the Applicant: in my respectful view, it should have been. In addition, the Schatz/Brannen Memo is objectionable because it contains errors which the Applicant would have corrected had he been afforded that opportunity. As a final point the Schatz/Brannen Memo is objectionable because of its nature and the fact that it was written by or at least co-authored by the first-level grievance officer, Mr. Schatz.

[44] I will consider these points in detail.

The Schatz/Brannen Memo

[45] Mr. Shenher, the second level grievance officer requested a report on the Applicant from Mr. Schatz. Mr. Schatz was the Applicant's manager and he was also the first-level grievance officer. Mr. Shenher made this request almost nine months after the Applicant filed his grievance memorandum. Mr. Shenher asked Mr. Schatz to answer the following questions:

> What duties were assigned/not assigned and what was the time period in which these duties were assigned? Are these duties within the scope of the LA2A work description? If not, where do these duties fall and was acting pay provided to the employee if the duties were at a higher classification group and level? If acting pay was not provided, what was the reason?
>
> If Dale should not have been doing these duties, was Dale made aware by management that he should not be doing these duties? If yes, when was Dale informed, what were the duties that he should not be doing and has Dale been working within the scope of his work description since the classification took place?

[46] Notwithstanding the very long time it took to ask for these answers, the 8-page Schatz/Brannen Memo dated September 27, 2013 was prepared and returned in a matter of three or four days. It was co-authored by Mr. Schatz and Mr. Brannen. As may be recalled, Mr. Brannen was a DOJ lawyer and manager who reported to Mr. Schatz. Mr. Brannen had met with both the Applicant and Mr. Schatz to discuss the Applicant's Work Description back in December 2011.

[47] The Schatz/Brannen Memo, after setting out a lengthy "history and context" reported that:

> …no management or team leader duties have been assigned to Dale Kohlenberg.
>
> To the extent that he has directly received legal services requests and either acted upon the requests or assigned the requests unilaterally, it has been contrary to the protocol that has been in place for several years, as outlined above.
>
> …
>
> **CONCLUSION**
>
> The materials reviewed above do not support the claim that the core expectations and the core duties performed by Dale fall

> outside the LA-2A Work Description. The duties generally require sound knowledge, and his activities routinely fall into the categories of the Key Activities, Critical Thinking and Analysis, Communication and Interaction, Leadership, Physical and Sensory Effort, and Work Environment of the LA-2A Work Description.
>
> The above does not mean that he has never been asked to perform duties demanding higher competencies, which he may well possess. Similarly, particularly given the difficulties in attracting junior counsel to advisory positions, Dale has been required to perform legal services calling for competencies below the level of the Work Description.

[48] In support of his grievance, the Applicant had supplied many examples of his work product. Mr. Shenher attached examples in his request for information to Mr. Schatz. The Schatz/Brannen Memo analysed and commented on these various work products, which included opinions authored by the Applicant, power point presentations, a factum, an agreement, various emails and memos, memoranda and Memorandum of Understanding, a License to Use and Occupy Crown Lands, and other documents.

[49] The Applicant was not informed of the Schatz/Brannen Memo, nor given any opportunity to respond to it. I was given no reason why this document was not provided to the Applicant for his comments; the position of the DOJ is that there was no obligation to do so. Because the Applicant was not told of its existence, he was also unaware that the memo was co-authoried by Mr. Schatz. While the Schatz/Brannen Memo is marked “Protected B”, it was filed and given to the Applicant in the Certified Tribunal Record [CTR] in this Court docket, where the Applicant saw it for the first time. The Schatz/Brannen Memo was part of the record before Mr. Schenher; it is now part of the public record.

[50] While the duty of procedural fairness at each level of the grievance process lies at the low end of the spectrum in these types of cases, in my respectful view, the duty still exists; it may not be said that the duty of procedural fairness is non-existent.

[51] The general principles regarding the content of the duty of fairness in this connection are set out in in *Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 54 [*Re:Sound*], still apply. In *Re:Sound*, the Federal Court of Appeal stated:

> [54] However, agencies must ensure that, if they obtain information from third parties, they do not thereby jeopardize parties' participatory rights: to know and to comment on material relevant to the decision; to have notice of the grounds on which the decision may be based; and to have an opportunity to make representations accordingly. The ultimate question for a reviewing court in every case is whether, in all the circumstances (including respect for administrative procedural choices), the tribunal's decision-making procedure was essentially fair. This involves a contextual and fact-specific inquiry.

[52] This duty of fairness was breached in several respects.

[53] First, withholding the Schatz/Brannen Memo from the Applicant offended a most basic rule of procedural fairness; namely, that an applicant is entitled to know the case against her or him. Here, the Schatz/Brannen Memo provided a detailed and somewhat negative critique of the Applicant's various work products, in addition to providing responses to the questions asked by Mr. Shenher.

[54] The memo was undeniably relevant. And it was material. In my respectful view, this memo in many respects constituted the case against the Applicant. It set out material upon which

the second-level grievance officer made his decision. In my view, the Schatz/Brannen Memo was factored into the final decision to dismiss the second level grievance. Therefore the Applicant was entitled to have it provided to him, and to respond to it, even given that the duty of fairness in this respect is at the low end.

[55] I was pointed to no statutory basis on which the Court might conclude that the duty to disclose is non-existent in a case such as this. Nor, given the delay in asking for it, am I able to conclude that considerations of urgency or delay justified keeping it from the Applicant. Nor may I conclude that the Applicant, in effect, knew what was in the memo such that he could or should have anticipated and addressed its comments without seeing it. Little, indeed almost none of the information contained in the Schatz/Brannen Memo was already on the record.

[56] There is a second objection to this memo, namely, that the second-level grievance officer should not have asked the first-level grievance officer for such comprehensive input into the second-level decision. By attaching the Applicant's examples of work materials to his request for information, it appears that comments were invited on essentially all of the Applicant's submissions. The questions themselves are quite broad. Overall, in my respectful view, this created the appearance that the officer wanted answers not only to the wide questions posed, but a substantial briefing on the Applicant and his work for the DOJ.

[57] It was therefore not unexpected that Mr. Schatz commented extensively on the Applicant's work, in addition to answering the questions. The memo paints what I consider a somewhat negative picture of the Applicant.

[58] I do not doubt that, particularly in smaller offices, it may be necessary for a second-level grievance officer to request specific information from a first-level grievance officer where that information is necessary to complete his or her investigation. In this case, however, not only was the request made by the second officer quite comprehensive, but so was the response. This is all the more reason why the Applicant should have had a chance to respond to it.

[59] In this respect, the case at bar recalls the discussion in *Majdan*, above, where this Court concluded:

> [40] I find that the Committee also breached its duty of fairness by not providing the applicant with an opportunity to respond to the information obtained from Mr. Vaillancourt. The respondent acknowledges that the Committee sought information from Mr. Vaillancourt to clarify the applicant's duties while she worked in the GP. However, the respondent submits, he did not provide the Committee with any useful information and therefore the Committee did not need to inform the applicant of this information and provide her with an opportunity to respond.
>
> …
>
> [42] Thus, contrary to the respondent's submission, Mr. Vaillancourt's information was not completely duplicative of the information presented by the applicant. In the final sentence, Mr. Vaillancourt characterized the GP as involving the provision of expert advice, as opposed to a leadership or management role. This was not benign or neutral information – Mr. Vaillancourt characterized the GP in a way that would clearly merit a lower classification than that proposed by the applicant.
>
> [43] Thus, I do not accept the respondent's argument that Mr. Vaillancourt's information had no effect whatsoever to the Committee's determination. Rather, I find that this is similar to the undisclosed information in *Bulat*, above – the manager in that case provided information that supported a lower classification than the grievor sought. Similarly in this case, Mr. Vaillancourt's information was clearly detrimental to the applicant's grievance (which is particularly problematic given the fact that he was not her supervisor, and apparently had an *animus* towards her).

> …
>
> [47] Even if there is a low standard of fairness in classification grievances, this is one of those cases where the Committee simply gave lip service to its duty.

[60] Here, even lip service was not given.

[61] A further point must be factored into this analysis. In my respectful view, the manner in which the request and the response were passed between the second- and first-level grievance officers, coupled with the nature of the request and reply, transformed what was supposed to be a multi-step grievance procedure into what in its appearance was a closed loop; on the record, it appears that the second grievance officer, who dismissed the grievance before him, relied excessively on the first level grievance officer who had done the same.

[62] In my respectful view, this breached the fundamental rule that justice must not only be done, but it must be seen to be done: *R v Sheppard*, 2002 SCC 26 at para 15; *Société des Acadiens v Association of Parents,* [1986] 1 SCR 549 at para 153; *Wewaykum Indian Band v Canada,* 2003 SCC 45, [2003] 2 SCR 259 at para 67 [*Wewaykum*]; *Heron Bay Investments Ltd v Canada,* 2010 FCA 203 at para 41 citing *James v Canada (Minister of National Revenue)*, [2000] FCJ No 2135 (QL), 2000 CanLII 16700 at paras 51-52 (FCA) [*James*]; *NCJ Educational Services Limited v Canada (National Revenue)*, 2009 FCA 131 at para 39 citing *James*.

[63] My view on this point is reinforced by the fact that the second level grievance officer, with one exception, did not consult any of the persons identified by the Applicant as references. This fact is not in dispute. The only exception was Mr. Brannen who co-authored the report with

Mr. Schatz. While I do not say generally that all or any of an applicant's proffered sources of support must be consulted, the fact that virtually none were consulted detracts from the appearance of fairness in this case.

[64] These are not my only concerns. I am left to wonder why Mr. Shenher's request for additional information was not sent to Mr. Brannen instead of Mr. Schatz, given that Mr. Brannen was not the first-level grievance officer, and had managerial responsibilities. In addition, he had expertise regarding the Applicant's work description, as evidenced both by his co-authorship of the memo sent to Mr. Shenher and by his attendance with Mr. Schatz at the work description interview with the Applicant in December 2011.

[65] In my respectful view, there is also merit in the Applicant's assertion that the Schatz/Brannen Memo contained errors relating to his role as "advisory team leader". A review of the material supports my conclusion that the Applicant was indeed an "advisory team leader". Indeed, this was not disputed. While the Respondent argued that the Applicant's role as advisory team leader did not qualify him to be considered a "team leader" within the higher level work descriptions, in my respectful view as a consequence of his role as "advisory team leader", he was still a "team leader".

[66] In my respectful view however, there is no merit to the Applicant's further submission that the second level grievance officer should not have had or reviewed the decision of the first level grievance officer. In my view, a second-level grievance officer does not act with procedural unfairness if she or he considers a decision made at the first level; while a *de novo* hearing in the

grievance process requires that the decision be made afresh, I do not agree with the Applicant's position that a decision at an earlier level as a legal matter must be ignored: *MacPhail v Canada (Attorney General),* 2016 FC 153 at para 18, *James v Canada (Attorney General),* 2015 FC 965 at paras 98-99.

Reasonableness of the second-level grievance decision (alternative finding)

[67] If the Second-Level Decision was not tainted by procedural unfairness issues, I would have found that it meets the test of reasonableness set out in *Dunsmuir*. As with the First-level Decision, the Second-Level Decision assesses the allegations of the Applicant against the Work Description at issue and concludes that the work described by the Applicant "is within the generic work description." While, as the Applicant stresses, it does conclude that the Applicant's work is "adequately" reflected in his work description, and while I agree that the word "adequately" is not the best word to use, the decision read as a whole, without engaging in a treasure hunt for errors, is reasonable in that is it defensible on the facts and law.

C. Third-Level Grievance before the ADM

[68] The Applicant pursued his grievance to the ADM as the third-level grievance officer. In this connection, and in addition to the submissions of the Applicant, the ADM received a report dated September 9, 2014 from Maximilian Baier [Mr. Baier], a Senior Labour Relations Advisor. Mr. Baier's report recommended that the Applicant's grievance be dismissed. As with the Schatz/Brannen Memo, Mr. Baier's memo was not disclosed to the Applicant, nor was the Applicant given any opportunity to respond to it in either his written or oral submissions. The

Applicant argues this was a breach of procedural fairness that was particularly unfair because the report included both irrelevant and admittedly incorrect information that may have factored into the ADM's final decision. I agree.

The Bias Decision

[69] The third-level grievance was split into two separate hearings. At the first hearing on November 6, 2014, the Applicant once again raised the issue of bias. In her decision dated December 10, 2014, the ADM dismissed this allegation [Bias Decision] for the following reasons:

> The grievance procedure which is administrative in nature is in line with the departmental Delegation of Human Resources Authorities Instrument. Given the delegated authority, it is presumed that the person making the decision at the first or second levels will probably have had some involvement in, or knowledge of the matter under review. That said, each level in the grievance process is considered a *de novo* hearing.
>
> Your position appears to be that a reasonable apprehension of bias exists from the structure of the grievance process itself so that any decision I make could be influenced by the previous decision-makers. After having reviewed the applicable jurisprudence, I have concluded that the concept of bias does not apply generally to pre-adjudicative processes such as the Department's grievance process.

[70] The ADM also noted that, at the time of his grievance transmittal, the Applicant did not allege bias against the second level grievance officer.

[71] The Applicant made two objections to the Bias Decision. First, he says that one cannot have a *de novo* hearing if previous decision(s) are before a subsequent grievance officer. Second, he says that the last sentence in the above excerpt mistakes his situation in that, for him, there

was no adjudicative process due to his status as an excluded employee. I will deal with each objection separately.

De novo issue

[72] On the *de novo* issue, I have already found that a second-level grievance officer conducts a procedurally fair *de novo* hearing notwithstanding she or he has the first-level decision for review in the material in the docket or file. In this case, I am satisfied that the reference to a *de novo* hearing in the ADM's Bias Decision (and in Mr. Baier's report) refers to a process in which both the Applicant and Respondent argue the matter afresh based on the same or new evidence, but in which proper underlying decision(s) and material may also be considered.

[73] I agree with the Respondent's submission that a *de novo* hearing at each step of the grievance procedure does not mean that the record below is wiped clean. For example, when a grievance is referred to adjudication, section 96 of the *Regulations* requires the employer to file with the Board a copy of the grievance decisions made at each level below. In my view, if the AJC had approved his request for adjudication before the PSLRB, it would have all three decisions before it. This confirms my finding that the use of the expression *de novo* in this context was not intended to be understood in a stricter sense.

Wrong test issue

[74] Nor am I persuaded that the Applicant has reason to complain that the wrong test was used because he was an excluded employee. As noted previously, the fact that the Applicant is an

excluded employee did not as such result in his being unable to pursue his grievance to the PSLRB - he could have done that had the AJC given its approval: *PSLRA* subsection 209(2). There was nothing in the record to say that approval would not be given; at the time the ADM wrote her Bias Decision, it remained open that the AJC would support the Applicant in a possible grievance. The Applicant is not correct in asserting that adjudication was "never open" to him. There was no mistake in respect of the applicable legal test in this regard.

[75] I also agree, and there was no dispute, that the law is as set out in the Bias Decision, namely, that the concept of bias generally does not apply to pre-adjudicative processes such as these grievance processes. As stated in Brown & Beatty:

> The requirement of impartiality, however, does not apply to the pre-arbitration stages of the proceeding. Further, it has been held that considerations of "bias" are not relevant in the composition and operation of internal dispute-resolution mechanisms prior to the appointment of a board of arbitrators.
>
> Donald JM Brown & David M Beatty, *Canadian Labour Arbitration,* ch 1 at para 1:5210; see also *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259 at para 77; *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 19-24.

The ADM's decision on the merits

[76] With the Bias Decision made, the Applicant continued with his Work Description grievance. On June 2, 2015, after a hearing before the ADM, his third level grievance was dismissed on the merits [Merits Decision]. The ADM found:

> With respect to your expertise it is clear that you possess highly specialized knowledge in the area of real estate law and, in particular, transactions relating to Crown lands. I have taken note of the documentation that you provided which indicates that your

expertise in this area of law is valued by other counsel and stakeholders. However, I would expect that a lawyer who has been practicing in a specialized field for a lengthy period of time as you have, would develop considerable expertise in that field. Consequently, I do not believe this expertise falls outside of the normal expectations of a practicing LP-02, nor do I find I a reflective of a duty that is outside the scope of your current work description.

With respect to your submission that you are acting as a *de facto* advisory team leader in that you supervise the work of several people from around the Prairie Region, I have been advised that the employees to whom you assign tasks are less experienced counsel, paralegals and support staff. Recognizing that you oversee some of their work, I also note that you do not prepare annual assessments nor does anyone formally report to you.

The LA-2A work description, as well as the LP-02 practitioner work description, specifically sets out duties relating to coaching, knowledge transfer and assigning tasks. Under "Key Activities", the work description states: "…providing coaching and knowledge transfer and assigning tasks to less experience counsel, paralegals and support staff (e.g. legal assistants) and overseeing the work related to assigned matters…providing input to managers for performance evaluation and other purposes on the performance of less experienced counsel, paralegals, students and staff they have coached or supervised." This portion of the work description recognizes that it is common for any lawyer at the LP-02 level who is lead counsel on files to assign tasks to junior counsel and paralegals and to plan and set priorities in the delivery of legal services. I am satisfied that the scope of your day to day duties and responsibilities are such that they are covered by the generic work description.

With respect to the profile and sensitivity of the files that you deal with on a routine basis, the work description states that LA-2A/LP-02 counsel are expected to: "Provide a broad range of comprehensive legal services to client departments and agencies…"; possess "…a sound knowledge of the law…relevant to assigned matters…"; "…provide a full range of legal services to respond to the needs of client departments and agencies…"; and, "…provide legal and legal policy advice as well as service on a range of comprehensive and challenging issues having broad reaching impacts…." From the information before me, I am satisfied that the scope and sensitivity of the files that you deal with on a day to day basis are captured within the requirements of the work description.

[77] There are two aspects of this decision to review: whether it was tainted by procedural unfairness and whether it passes muster on a reasonableness basis. In my respectful view, the Merits Decision is procedurally flawed and must be set aside. Had I not made that finding, I would have found it to be reasonable.

Procedural fairness of the third-level grievance decision

[78] The ADM's decision is procedurally flawed and must be set aside for several reasons. First, the ADM had before her Mr. Baier's report. I understand such memos are par for the course within the labour relations context at this level of the grievance procedure. Indeed, the Applicant acknowledged as much when he requested that material he had submitted to Mr. Shenher at the second level be sent "to [the ADM's] office for review by [the ADM's] office's Labour Relations Officer and/or delegate…" The ADM is entitled to the assistance of such staff labour relations assistance.

[79] Nevertheless, a procedural unfairness issue arises from the failure to make the Applicant aware of the Baier report either by giving him a copy or at the very least an adequate summary of it, together with affording him an opportunity to respond. For the same reasons provided earlier in relation to the Schatz/Brannen Memo, Mr. Baier's report should have been given to the Applicant so that he could respond to it. It was part of the record before the ADM. It contained relevant and material information on the matter at hand. In my view, it formed the basis of the case against the Applicant, therefore - on first principles - the Applicant was entitled to have it, even acknowledging that the duty of procedural fairness falls at the low end of the spectrum in this connection.

[80] Once again, I was pointed to no statutory basis upon which the decision to withhold the Baier report might be based. There were no relevant considerations of urgency or timeliness that I was pointed to. It cannot be said that the report contained expected and non-controversial material. Nor may it be said that the Applicant knew of its contents in advance and therefore did not need an opportunity to comment upon it.

[81] I was given no reason why the report could not be shared with the Applicant, although counsel for the Minister noted a "labour relations privilege". However, I was pointed to no authority in that regard. In any event, it is too late for the Respondent to claim privilege over a document that has already been disclosed to the Applicant through its inclusion in the CTR (as a result of which it is also in the public domain). As a matter of relevance, the Federal Court of Appeal recently set out the process to claim privilege over a document that would otherwise be included in a CTR: *Bernard v Public Service Alliance of Canada*, 2017 FCA 35.

[82] In my respectful view, the Baier report contained material errors that further support my conclusion that it should have been provided to the Applicant for his review and response. First, the report says that the Applicant "did not meet expectations in his 2013-14 performance evaluation". In a work description grievance, this statement is quite material and prejudicial; it puts a cloud over the Applicant's knowledge of what he was required to do, i.e., his work description, the very matter in dispute. As an aspersion, it also might affect his credibility when outlining what he did. It may also insinuate that the Applicant lacks knowledge about what his responsibilities actually are.

[83] The statement was not correct; the Applicant received three “fully meets” assessments and one “exceeds” rating. None of these positive assessments were noted by in the report. The fact is that the Applicant had successfully grieved to remove what had been a negative assessment, the outcome of which was its replacement with “fully meets” assessments; this is what Mr. Baier should have reported if he wanted to touch that subject at all. In cross-examination, the statement was admitted to be incorrect.

[84] Secondly, the report noted that the Applicant had been disciplined in the same year for certain “behaviours”. The plural use of the word “behaviour” indicates that there were more than one incident reasons leading to the the Applicant being disciplined. However, in fact, there was only one behaviour for which he had disciplined, and the evidence was that the disciplinary action was grieved down to one-fifth of that originally assessed. Mr. Baier was unable to point to the relevance of this comment in the context of a work description grievance. Additionally, the report stated that the Applicant did not prepare annual assessments for anyone, which appears to have been inaccurate. The report is, once again, a generally negative one.

[85] Of these, the inaccurate attack on the Applicant’s competence is the most serious. In my respectful view, it went directly to the Work Description and what the Applicant did (as opposed to what he said he did). He should have had an opportunity to see and respond to the report. In all the circumstances, I am unable to say that the report had no impact or effect on the ADM’s decision. The following from the Federal Court of Appeal’s decision in *Re:Sound* is on point, even at the low end of the procedural fairness spectrum:

> [83] …Only in the clearest cases will an administrative decision vitiated by such a serious breach of procedural fairness as occurred

> here be permitted to stand on the ground that it would have made no difference to the tribunal's decision: see, for example, *Canadian Cable Television Association v. American College Sports Collective of Canada, Inc.*, [1991] 3 F.C. 626 (F.C.A.). This is not one of them.

[86] An additional issue of procedural unfairness arises because the ADM also had the Schatz/Brannen Memo before her, prepared as it was for the second-level grievance officer. As discussed above, the Applicant had not seen the Schatz/Brannen Memo, nor was he given an opportunity to comment on it. I found no reason for Mr. Shenher to keep it from the Applicant. For the reasons set above underlying my finding that Schatz/Brannen memo should have been shared with the Applicant at the second level, it should have been shared with him at the third level. The failure to do so vitiated the third level decision. I appreciate that the duty of procedural fairness is at the low end of spectrum. However, to ignore what happened here is to say there is no duty of procedural fairness in these cases, which is not my conception of the law concerning relevant and material information such as this.

[87] Respondent's counsel notes that this Applicant has access to the Federal Court on judicial review, where he will see the entire record against him. However, the remedy of judicial review does not support the DOJ's decision to keep from the Applicant relevant and material documents, including material that makes, or in large part makes the case against him. A hearing in this Court is not a cure for procedurally defective proceedings below, if only because the normal remedy is reconsideration. Judicial review in this Court is conducted on the record; in my respectful view, the required record is one generated by grievance officers who have heard both sides in an essentially fair manner. Where that is the case, this Court reviews the reasonableness of the decision, not its correctness. The Federal Court is not simply another step in the grievance

procedure, because while grievance officers deal with the merits of a case, this Court normally does not.

[88] On the basis of the above, I would grant judicial review, set aside the Third-Level Decision and remit it for reconsideration on terms discussed later in these Reasons. I find no merit in the Applicant's request for special directions: *Canada (Attorney General) v Gilbert*, 2009 FCA 76 at paras 22-23.

Reasonableness of the Third-Level Grievance Decision (in the alternative)

[89] If I had not found procedural fairness issues requiring the third level grievance to be re-determined, I would have found the ADM's decision to be reasonable. As with the two prior decisions, the ADM considered the Applicant's position and reviewed what the Applicant did against the generic Work Description he had been given. While the ADM unreasonably rejected the Applicant's claim that he was a "team leader" (the second-level officer made the same unreasonable finding), the balance of the findings of the ADM are defensible on the record; what the Applicant did matched up with the generic Work Description at issue.

[90] Stepping back and viewing the reasonableness of the decision taken as an organic whole, without treating the judicial review process as a treasure hunt for errors, it is my view that the Third-Level Decision is intelligible and, in addition, is defensible on the facts and law as required by *Dunsmuir* (except regarding the procedural fairness issues).

VI. Conclusion

[91] Judicial review is granted. The matter will be remanded for reconsideration at the third level by a different grievance officer with the assistance of a different staff relations advisor, and on the basis of a record that excludes the Schatz/Brannen Memo, the Second-Level Decision and the Baier report, but which shall include the First-Level Decision and such other submissions as the parties may be permitted to file. The Applicant asked for hearing of a maximum of 10 days which he says he might have received had adjudication been available, i.e., if the AJC approved, but and with respect, this is a matter for engagement with the new third level grievance officer; therefore no such order is made.

VII. Costs

[92] Both parties seek costs and in the normal course costs follow the event. At the end of the hearing, I asked both parties to advise what lump sum costs should be awarded in the event they were successful. The Applicant requested $3,500.00 for fees plus $1,713.77 for disbursements; the Respondent sought a lump sum award in the amount of $1,500.00.

[93] I have considered a number of factors: the fact that the Applicant was successful; the general rule that costs follow the event; the fact, however, that the Applicant is a self-represented litigant in respect of whom there was no evidence of foregone remunerative activity; and, the fact that this is a slightly more complex judicial review than some. I have also considered the Applicant's argument that this case warrants a special order of costs to express the Court's disapproval of the Respondent's conduct, but have concluded otherwise on the evidence in that is

a straightforward case of procedural unfairness to be remedied by judicial review. In my view, a reasonable all-inclusive lump sum cost award (inclusive of fees, disbursements, taxes and all other assessable amounts) is $2,500.00, which the Respondent shall pay to the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted, and the decision of the ADM as third-level grievance officer is set aside.
2. The matter is remanded for reconsideration by a different third level grievance officer assisted by a different staff relations officer.
3. In such reconsideration, the different third level grievance officer shall proceed on the basis of a record that excludes the Schatz/Brannen Memo, the Second Level Decision, the Baier report, and the decision of the third level grievance officer, but which shall include the decision of the first level grievance officer and such other submissions as the parties are permitted to make.
4. The Respondent shall pay an all-inclusive lump sum to the Applicant for costs hereby fixed at $2,500.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1072-15
STYLE OF CAUSE:	DALE KOHLENBERG v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	MARCH 16, 2017
JUDGMENT AND REASONS:	BROWN J.
DATED:	APRIL 27, 2017

APPEARANCES:

Dale Kohlenberg	FOR THE APPLICANT (ON HIS OWN BEHALF)
Caroline Engmann	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENT